

## **Exhibit “A”**

**MORRIS, NICHOLS, ARSHT & TUNNELL LLP**

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P.O. Box 1347  
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GREGORY W. WERKHEISER  
302 351 9229  
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September 21, 2006

**Via Electronic Filing  
And Hand Delivery**

The Honorable Kent A. Jordan  
United States District Court  
for the District of Delaware  
844 N. King Street  
Wilmington, DE 19801

Re: *Robert K. Alber v. Traub, Bonacquist & Fox LLP, et al.*  
(District Court Case No. 05- 0830-KAJ)  
*Morris, Nichols, Arsh & Tunnell v. Traub, Bonacquist & Fox LLP, et al.*  
(District Court Case No. 05- 0831-KAJ)

Dear Judge Jordan:

I write on behalf of my firm Morris, Nichols, Arsh & Tunnell, LLP ("Morris Nichols") concerning (a) the scheduling order (Docket No. 25) (the "Alber Appeal Scheduling Order") entered September 20, 2006 on the docket of the appeal captioned *Robert K. Alber v. Traub, Bonacquist & Fox LLP, et al.*, Civil Action No. 05-0830 (KAJ) (the "Alber Appeal"), in which Morris Nichols is one of several appellees, and (b) the scheduling order (Docket No. 14) (the "MNAT Cross-Appeal Scheduling Order," and together with the Alber Appeal Scheduling Order, the "Scheduling Orders") entered September 19, 2006 on the docket of the related cross-appeal captioned *Morris, Nichols, Arsh & Tunnell v. Traub, Bonacquist & Fox LLP, et al.*, Civil Action No. 05-0831 (KAJ) (the "MNAT Cross-Appeal," and together with the Alber Appeal, the "Appeals"), in which Morris Nichols is the cross-appellant. Morris Nichols believes that a possible reading of the Scheduling Orders may lead to unintended results, including the filing of more briefs than would otherwise be necessary to address the subject matter of the Appeals. Accordingly, Morris Nichols respectfully requests that the Court clarify the Scheduling Orders at its earliest opportunity.

Honorable Kent A. Jordan  
September 21, 2006  
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The decretal paragraphs of both Scheduling Orders are identical and read as follows: "[A]ppellant's opening brief shall be filed on or before September 27, 2006; appellees' answering brief shall be filed on or before October 11, 2006; and appellant's reply brief shall be filed on or before October 18, 2006." It is clear to us that Mr. Alber is the "appellant" referenced in the Alber Appeal Scheduling Order. It, however, is unclear to us whether Mr. Alber or Morris Nichols is being referenced as the "appellant" in the MNAT Cross-Appeal Scheduling Order.

If the term "appellant" in the MNAT Cross-Appeal Scheduling Order refers to Morris Nichols it would have the effect of requiring Morris Nichols to file its opening brief in support of the narrow issues raised in its cross-appeal at the same time as Mr. Alber files his opening brief in support of the Alber Appeal. This structure would produce inefficiencies in that both Morris Nichols and Mr. Alber would be required to file additional briefs than would otherwise be necessary. If, however, the term "appellant" in the MNAT Cross-Appeal Scheduling Order refers to Mr. Alber it would have the effect of denying Morris Nichols tender a reply in support of the MNAT Cross-Appeal.

We suggest that the Court and the parties may be better served by clarifying the Scheduling Orders as follows:

- Mr. Alber shall file his opening brief in support of the Alber Appeal on or before September 27, 2006.
- Appellees Traub, Bonacquist & Fox LLP, Barry Gold, Morris Nichols, Post-Effective Date Committee of EBC I, Inc. and the United States Trustee shall each file their respective answering briefs on or before October 11, 2006. Morris Nichols' answering brief shall double as its opening brief in support of the MNAT Cross-Appeal.
- Mr. Alber shall file any reply brief in support of the Alber Appeal on or before October 18, 2006. Mr. Alber's reply brief shall also double as his answering brief in opposition to the MNAT Cross-Appeal.
- Morris Nichols shall file any reply brief in support of the MNAT Cross-Appeal on or before October 25, 2006.

The foregoing briefing schedule will necessitate the filing of only four, rather than six sets of briefs. Further, while it is always in this Court's discretion to establish a different briefing schedule, the foregoing briefing schedule more closely tracks the default schedule for the briefing of a bankruptcy appeal when a cross-appeal is present contemplated by Rule 8009(a) of the Federal Rules of Bankruptcy Procedure. Rule 8009(a)(2) provides: "If the appellee has filed a cross appeal, the [answering] brief of the appellee shall contain the issues and argument pertinent to the cross appeal, denominated as such, and the response to the brief of the appellant." Rule 8009(a)(3) provides: "[I]f the appellee has cross-appealed, the appellee may file and serve a

Honorable Kent A. Jordan  
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reply brief to the response of the appellant to the issues presented in the cross appeal within 10 days after service of the reply brief of the appellant."

On September 20, 2006, we attempted to contact Mr. Alber by e-mail (using the most recent email address Mr. Alber had provided in his communications with us) to ascertain whether Mr. Alber would consent to this clarification of the Scheduling Orders. A copy of that email is attached as Exhibit A hereto. Given the relatively short period of time until opening briefs are due under the Scheduling Orders, we requested Mr. Alber's response by 2:00 p.m. (prevailing Eastern Time) today, September 21, 2006. Mr. Alber, however, has not responded to our communication. We have also discussed this request with the other Appellees, and they have expressed no objection.

For the foregoing reasons, Morris Nichols respectfully requests that the Court clarify the Scheduling Orders, particularly as they relate to briefing in connection with the MNAT Cross-Appeal. To assist the Court in clarifying the briefing schedule for the Appeals, we have provided proposed "Amended Consolidated Scheduling Order" attached as Exhibit B hereto. In light of the short period of time until opening briefs are due under the Scheduling Orders, Morris Nichols respectfully asks that the Court act quickly to clarify the Scheduling Orders or, alternatively, to schedule a teleconference to consider this matter.

The undersigned is available at the Court's convenience should the Court wish to convene a hearing or teleconference to address this matter.

Respectfully,



Gregory W. Werkheiser  
Morris, Nichols, Arsh & Tunnell LLP

GGW/mf

cc: Frederick B. Rosner, Esq.  
James L. Garrity, Esq.  
Ronald R. Sussman, Esq.  
Mark. Minuti, Esq.  
Mark S. Kenney, Esq.  
G. David Dean, Esq.  
Steven E. Fox, Esq.  
Robert Alber

## **Exhibit A**

**Werkheiser, Gregory**

**From:** Werkheiser, Gregory  
**Sent:** Wednesday, September 20, 2006 12:29 PM  
**To:** 'Robert K Alber'  
**Cc:** 'Barry Gold - Mark Minuti, ESQ'; 'TB&F - Susan Balaschak, ESQ'; 'TB&F - Ronald Sussman, ESQ'; 'TB&F - James Garrity, ESQ'; 'Barry Gold - G. David Dean, ESQ'; 'TB&F - Paul Traub, ESQ'; 'U.S. Trustee - Mark S. Kenney'; 'TB&F - Fredrick B. Rosner, ESQ'; Abbott, Derek; Dehney, Robert  
**Subject:** Alber v. Traub, Bonacquist & Fox LLP, et al., Civil Action Nos. 05-830(KAJ) and 05-831(KAJ)  
**Importance:** High

Mr. Alber,

I write concerning the two scheduling orders recently entered by the Delaware District Court in your appeal, Civil Action No. 05-0830 (KAJ) (the "Alber Appeal"), and the cross-appeal of Morris, Nichols, Arsh & Tunnell LLP ("Morris Nichols"), Civil Action No. 05-831 (KAJ) (the "MNAT Cross-Appeal"). Copies of the scheduling orders are attached for your reference.

Both scheduling orders provide: "[A]ppellant's opening brief shall be filed on or before September 27, 2006; appellees' answering brief shall be filed on or before October 11, 2006; and appellant's reply brief shall be filed on or before October 18, 2006."

It is clear to us that you are the "appellant" referred to in the scheduling order for the Alber Appeal; however, it is not clear whether the Court was referring to you or to Morris Nichols as the "appellant" in the scheduling order for the MNAT Cross-Appeal.

In any event, the scheduling order for the MNAT Cross-Appeal is inconsistent with Bankruptcy Rule 8009(a) to the extent that it is read to require Morris Nichols to present issues and argument related to the MNAT-Cross Appeal at that the same time you are filing your opening brief in the Alber Appeal. In describing the duties of an appellee to file an answering brief within 15 days after the appellant files its opening brief, Bankruptcy Rule 8009(a)(2) provides: "If the appellee has filed a cross appeal, the [answering] brief of the appellee shall contain the issues and argument pertinent to the cross appeal, denominated as such, and the response to the brief of the appellant."

Additionally, Bankruptcy Rule 8009(a)(3) provides: "[I]f the appellee has cross-appealed, the appellee may file and serve a reply brief to the response of the appellant to the issues presented in the cross appeal within 10 days after service of the reply brief of the appellant." We believe that the scheduling order should recognize Morris Nichols' right to file a reply brief in support of the MNAT Cross-Appeal.

We believe that the Court did not intend by the scheduling orders to modify the normal order of briefing in appeals such as these where a cross-appeal is pending or to eliminate Morris Nichols' right to file a reply brief in support of the MNAT Cross-Appeal. Accordingly, Morris Nichols intends to seek clarification from the Court of the scheduling orders' meaning insofar as they relate to the MNAT Cross-Appeal.

We believe that this should not be a controversial issue and therefore request that you consent to the clarification of the scheduling orders as set forth above. Please notify us by 2:00 p.m. (Eastern Time) tomorrow, Thursday, September 21, 2006, whether you consent to the clarification of the scheduling orders in the manner described above. Thank you.

Gregory W. Werkheiser  
MORRIS, NICHOLS, ARSH & TUNNELL LLP  
Chase Manhattan Centre, 18th Floor  
1201 North Market Street  
P.O. Box 1347  
Wilmington, DE 19899-1347

Main: 302.658.9200  
Direct Dial: 302.351.9229  
Fax: 302.425.4663

Please note that effective as of January 1, 2006, my direct dial telephone number changed from 302.575.7229 to 302.351.9229. Our main telephone number and my fax number have not changed. Thank you.

M | N | A | T |



eToysAppealSched  
ule2.pdf (31 K... eToysAppealSched  
ule1.pdf (33 K...

Tracking:	Recipient	Delivery
	'Robert K Alber'	
	'Barry Gold - Mark Minuti, ESQ'	
	'TB&F - Susan Balaschak, ESQ'	
	'TB&F - Ronald Sussman, ESQ'	
	'TB&F - James Garrity, ESQ'	
	'Barry Gold - G. David Dean, ESQ'	
	'TB&F - Paul Traub, ESQ'	
	'U.S. Trustee - Mark S. Kenney'	
	'TB&F - Fredrick B. Rosner, ESQ'	
	Abbott, Derek	Delivered: 9/20/2006 12:29 PM
	Dehney, Robert	Delivered: 9/20/2006 12:29 PM

**Werkheiser, Gregory**

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**From:** Robert K Alber [condo28@mail.com]  
**Sent:** Wednesday, September 20, 2006 6:27 PM  
**To:** Werkheiser, Gregory  
**Subject:** Read: Alber v. Traub, Bonacquist & Fox LLP, et al., Civil Action Nos. 05-830(KAJ) and 05-831 (KAJ)  
  
**Importance:** High



ATT210392.txt

(303 B)

Your message

To: Robert K Alber  
Cc: Barry Gold - Mark Minuti, ESQ; TB&F - Susan Balaschak, ESQ; TB&F - Ronald Sussman, ESQ; TB&F - James Garrity, ESQ; Barry Gol...  
Subject: 9/20/2006 9:28 AM

was read on 9/20/2006 3:27 PM.

## **Exhibit B**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

-----X	
In re:	: Chapter 11
ETOYS, INC., et al.,	: Case Nos. 01-0706 (MFW)
Debtors.	: Through 01-0709 (MFW)
ROBERT K. ALBER, <i>Pro Se</i> ,	: Appellant,
v.	: Civil Action No. 05-830 (KAJ)
TRAUB, BONACQUIST & FOX LLP, BARRY GOLD, MORRIS NICHOLS ARSHT & TUNNELL LLP, and POST- EFFECTIVE DATE COMMITTEE OF EBC I, INC.,	: Appellees.
MORRIS, NICHOLS, ARSHT & TUNNELL LLP,	: Cross-Appellant,
TRAUB, BONACQUIST & FOX LLP, BARRY GOLD, ROBERT K. ALBER and STEVEN HAAS	: Civil Action No. 05-831 (KAJ)
Cross-Appellees.	: -----X

**AMENDED CONSOLIDATED SCHEDULING ORDER**

WHEREAS, the parties have failed to agree on a briefing schedule;

WHEREAS, the Court initially established briefing schedules in connection with the above-captioned appeals by (a) a scheduling order (Docket No. 25) (the “Alber Appeal Scheduling Order”) entered September 20, 2006 on the docket of the appeal captioned *Robert K. Alber v. Traub, Bonacquist & Fox LLP, et al.*, Civil Action No. 05-0830 (KAJ) (the “Alber Appeal”), and (b) a scheduling order (Docket No. 14) (the “MNAT Cross-Appeal Scheduling Order,” and together with the Alber Appeal Scheduling Order, the “Original Scheduling Orders”) entered September 19, 2006 on the docket of the related cross-appeal captioned *Morris, Nichols, Arsh & Tunnell v. Traub, Bonacquist & Fox LLP, et al.*, Civil Action No. 05-0831 (KAJ) (the “MNAT Cross-Appeal,” and together with the Alber Appeal, the “Appeals”); and

WHEREAS, the Court has reconsidered the Original Scheduling Orders and, after due deliberation and notice to the parties to the Appeals, has concluded that this Order shall amend and supercede the Original Scheduling Orders;

IT IS HEREBY ORDERED that:

1. The MNAT Cross-Appeal is consolidated with the Alber Appeal for procedural purposes only. All future filings relating to the MNAT Cross-Appeal shall be made on the docket of the Alber Appeal, Civil Action No. 05-0830 (KAJ).

2. Robert K. Alber shall file and serve his opening brief in the Alber Appeal on or before September 27, 2006.

3. Appellees Traub, Bonacquist & Fox LLP, Barry Gold, Post-Effective Date Committee of EBC I, Inc., the United States Trustee and Morris, Nichols, Arsh & Tunnell LLP (“Morris Nichols”) shall file and serve their respective answering briefs on or before October 11, 2006. Morris Nichols’ answering brief also shall serve as its opening brief in connection with the MNAT Cross-Appeal.

4. Mr. Alber shall file his reply brief in connection with the Alber Appeal on or before October 18, 2006. Mr. Alber's reply brief also shall serve as his answering brief in connection with the MNAT Cross-Appeal.

5. Morris Nichols may file a reply brief in connection with the MNAT Cross-Appeal on or before October 25, 2006.

6. This Order amends and supersedes the Original Scheduling Orders in their entirety.

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UNITED STATES DISTRICT JUDGE

September \_\_\_, 2006  
Wilmington, Delaware

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